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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. McCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS McCREARY ET AL.

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	
INTRODUCTORY STATEMENT	10
I. THE FREE SPEECH CLAUSE PROHIBITS CONTENT-BASED DISCRIMINATION AGAINST RELIGIOUS EXPRESSION IN A TRADITIONAL PUBLIC FORUM	13
A. The Board's and the Village's Ability to Prohibit Expressive Activity in Boniface Circle is Severely Limited	13
B. The Display of a Creche at Christmas in Boniface Circle is Protected Symbolic Speech	17
II. THE SUPPRESSION OF THE CITIZENS GROUP'S RELIGIOUS EXPRESSION IS NOT NECESSARY TO FURTHER A SUFFICIENT GOVERNMENT INTEREST	20
A. Allowing Display of the Creche in Boniface Circle for a Short Time During the Christmas Season Does Not Violate the Establishment Clause	21
B. There is No Other Sufficient Government Interest at Stake to Support the Exclusion of the Citizens Group's Religious Expression From Boniface Circle	30
CONCLUSION	35

TABLE OF AUTHORITIES

Cases: PAGE

ACLU v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983) 33

Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) 6

Cantwell v. Connecticut, 310 U.S. 296 (1940).....14n.4

Cox v. Louisiana, 379 U.S. 559 (1965) 34

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ... 34

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973)..... 10

Engel v. Vitale, 370 U.S. 421 (1962) 25

Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 16

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 18, 20n.8, 22n.9

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 33

Lemon v. Kurtzman, 403 U.S. 602 (1971) 9, 10, 22

Lynch v. Donnelly, 104 S.Ct. 1355 (1984) ...9, 11, 21, 23, 24, 25, 26, 27, 28, 29n.15, 30

Marsh v. Chambers, 463 U.S. 783 (1983)..... 11

McGowan v. Maryland, 366 U.S. 420 (1961)..... 12

Members of the City Council v. Taxpayers for Vincent, 104 S.Ct. 2118 (1984).....15, 21, 33

Niemotko v. Maryland, 340 U.S. 268 (1951) 14n.4, 17

Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983) 8, 13, 20

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 15

Rubin v. Village of Scarsdale, 440 F.Supp. 607 (S.D.N.Y. 1977)..... 5

PAGE

Saia v. New York, 334 U.S. 558 (1948) 14n.4, 17

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 16

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).....16, 16n.7

Spence v. Washington, 418 U.S. 405 (1974) 8, 17, 18, 32

Stromberg v. California, 283 U.S. 359 (1931) 17

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 16, 17, 32, 34

United States v. Grace, 461 U.S. 171 (1983) 13, 14, 21

United States v. O'Brien, 391 U.S. 367 (1968)..... 17

Walz v. Tax Commission, 397 U.S. 664 (1970) 10

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 30, 31

Widmar v. Vincent, 454 U.S. 263 (1981).....9, 20, 21, 22

Wooley v. Maynard, 430 U.S. 705 (1977).....30, 31

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U.S. Const. Amend. I 1

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS McCREARY ET AL.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, applicable to the States under the Fourteenth Amendment, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . .

The Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents McCreary, et al. (the "Citizens Group") were residents of the Village of Scarsdale at the time of the commencement of this case and are not representatives of any church or religious institution. Four of the members of the Citizens Group, along with 13 other residents, submitted an application to the Board of Trustees of the Village to display a creche in Boniface Circle during the 1982 Christmas season. The applicants stated that the request for the display was for the purpose of availing themselves of their "constitutional right of freedom of religious expression." (J.A. 171).[1]

After the Board's denial of this application, the Citizens Group submitted a similar application in February, 1983 for a creche display during the 1983 Christmas season. This application included the following statement:

> All expenses and costs of the erection and removal of the display will be borne by the applicants, as well as any direct or indirect maintenance costs incurred on the Boniface Circle premises. A notation will be placed on the display indicating that it is made by private citizens and that the Village of Scarsdale does not support or sponsor the display.
>
> Among the several purposes of the undersigned in making this request are desires to join in the Village's celebration of Christmas by giving recognition to the birth

1 "J.A." refers to the Joint Appendix, "Pet. App." to the Appendix to the Petition for Certiorari, and "Stip. Ex." to exhibits included in the stipulated materials in the District Court record. Citations to the Petitioners' Brief are reflected by "Pet. Br."

> of Jesus Christ the occasion and namesake of the holiday, to communicate the Christmas message of peace and goodwill to the Scarsdale community, to celebrate and express religious convictions, and to evoke a spirit of religious toleration and freedom of expression which is fundamental to the well being of our Village and our nation, all of which purposes are grounded in the undersigned's civil and Constitutional rights of free speech and religious expression.

(J.A. 172-173).

There is no published statute, law, ordinance, rule or regulation in effect in Scarsdale requiring persons wishing to use Scarsdale's parks or other public properties to apply for permission from the Board of Trustees; and there are no published standards upon which the Board bases its decisions to grant or deny applicants permission to use Scarsdale's parks or other public properties. (Pet. App. 3a-4a). There are no regulations in Scarsdale pertaining to the use of Boniface Circle and other parks in Scarsdale other than those dealing with leaving the site in a clean and orderly condition, responsibility for damage and possible requirements to obtain public liability insurance, that are relevant to this case.

For 24 successive years, the Village, acting through its Board of Trustees, permitted a display by a committee of representatives of several area churches (the "Creche Committee") of a privately-owned creche in Boniface Circle for a short period of time during each Christmas season. The creche was erected, maintained and taken down by the Creche Committee. No public expense was involved in the display; the Village merely permitted access to the park. During this period, according to the Village Manager, the chief operating officer of the Village since 1961, no one ever complained about the length of time the creche was displayed, and the display never created a single traffic or safety problem. (J.A. 303-304). Further, the record in this case discloses no evidence that the display of a creche in

Boniface Circle interfered with the rights of others to the use of the park.[2]

Boniface Circle is the most appropriate site in the Village for a creche display since it is the principal locus of the Village's Christmas celebration. (Pet. App. 29a). Each year the Scarsdale Chamber of Commerce, of which the Village is a member, after application to and approval by the Village, decorates the area in and around Boniface Circle with festive Christmas lights and ornaments. Village employees put up these displays. In 1982, the large evergreen tree in Boniface Circle was decorated with Christmas lights by Village employees at the request of the Town Club, a private civic organization. The electricity for all these lights is paid for by the Village. Also, in 1982, the annual Town Club-sponsored Christmas carol sing for Villagers took place at Boniface Circle as it had in several earlier years. The repertoire included songs honoring the birth of Christ. As a regular feature of this event, Santa Claus arrived in a Village fire truck and the Deputy Mayor welcomed all Villagers in attendance. (J.A. 50-53; Pet. App. 5a-6a).

The Boniface Circle area continues to be the principal locus for public participation in the Village during the holiday season.[3] No other area in the Village comes close in terms of Christmas decorations and festivities to that of Boniface Circle and its environs. (J.A. 255).

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2 If the decision of the Circuit Court is allowed to stand, the Citizens Group will defer to and support the Creche Committee's next application to display their creche in Boniface Circle.

3 With no objection by the Board of Trustees or the Village, this year "the most extensive holiday promotion here in many years" took place on the sidewalks and private property within sight of Boniface Circle. Santa Claus roamed the downtown, "handing out candy canes." The "Old Fashioned Holiday" theme continued when "Santa and the Mistletoe Fairy", a children's play with magic and dance was presented. The Manhattan Savings Bank sponsored a musical performance for Chanukah and later a Christmas concert. Once again, The Town Club sponsored a Christmas Carol Sing on December 23, 1984 at Boniface Circle, "inviting the whole community to join in the caroling." *The Scarsdale Inquirer*, November 29, 1984, p. 1, December 13, 1984, p. 1 and December 20, 1984, p. 1.

After some early questioning, the annual creche display in Boniface Circle was largely a non-issue confined to routine Board approvals until a member of the New York Civil Liberties Union (J.A. 199) brought suit in 1976 challenging the constitutionality of the creche on grounds that the display violated the Establishment Clause. *Rubin v. Village of Scarsdale*, 440 F.Supp. 607 (S.D.N.Y. 1977). In this action the Village advised the court that:

> At all times relevant to this action, the Board of Trustees and the officials of the Village of Scarsdale have demonstrated a scrupulous regard for the applicable case and statute law, both Federal and State, and acted in conformity therewith so as neither to promote nor establish a particular religion or abridge the freedom of exercise of any religion.
>
> * * *
>
> Defendant Village and its officials acted in regard to the Creche Committee's request in a manner no different than it would if presented with a similar request from a similar organization.
>
> * * *
>
> . . . the Village has still not committed a proscribed act. It has neither established a religion nor prohibited the free exercise of religion. It has not favored one religious group over another, nor even become excessively entangled in religious matters to a prohibited degree.
>
> * * *
>
> . . . neither the intentions nor motives of defendant, Scarsdale Creche Committee, whether expressed or implied may be imputed to or attributed to the defendant, Village. . . . The Board of Trustees permitted a group of residents to use Village property as it would permit any other similar group seeking such permission.
>
> * * *
>
> In simple terms, this creche in Boniface Circle in Scarsdale was a part of a traditional celebration of the

> Christmas season. Village offices are closed on Christmas Day, an illuminated star is erected on Bellevue Hospital, the U.S. Postal Service issues a stamp depicting a Nativity Scene. Christmas trees are erected and decorated in public buildings everywhere, including the White House. None of these is the establishment of religion so abhorred by the Founding Fathers.

(J.A. 178, 183, 185, 186, 188).

Rubin was dismissed on jurisdictional grounds. In response to the *Rubin* litigation, the Law Committee of the Board of Trustees reviewed an earlier decision by the District of Columbia Circuit in *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973). As a result of this review, the Board prescribed the following text for a sign to be placed by the Creche Committee next to the creche:

> This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization.

(J.A. 125).

In 1975, a Trustee began to vote against the annual creche display, and in 1976 stated that a "symbol of religion should not be on public property". (J.A. 125). In subsequent years, additional Trustees voted against the creche display. In 1981, the Board by a 4-3 vote denied the Creche Committee permission to display the creche in Boniface Circle. As a result of this denial and the subsequent denials in 1982, as the District Court found, a "small uproar" occurred in Scarsdale. (Pet. App. 34a). This consisted mainly of letters and signed petitions addressed to the Board, and in particular to Mayor Jean Stone, who had cast the deciding vote against the creche in 1981, although in earlier years as Trustee she had voted for the creche display.

Until the Answer to the Citizens Group's Complaint on March 30, 1983, the Board or the Village never took the position that they were in any way sponsoring the display of the creche at Boniface Circle. Indeed, in *Rubin*, as seen above,

the Village took the opposite position. In 1980, a report of the Scarsdale Advisory Council of Human Relations to the Mayor and Board of Trustees summarized the differing points of view on the creche in Boniface Circle. This report set forth four reasons for the objections, none of which was an appearance of Village sponsorship. (J.A. 198-203).

When the Board, at an open meeting in December 1982, denied the residents permission to display a creche, it advanced no reasons for the denial. (J.A. 160-170). According to the Chairman of the Board's Law Committee, the Board did so because four Trustees found the display to be "socially undesirable". (Stip. Ex. 66, *The Scarsdale Inquirer*, December 16, 1982, p. 1).

The Citizens Group's action was commenced on February 7, 1983 and sought declaratory and injunctive relief based on the claim that the Board and the Village were depriving the Citizens Group of their First Amendment right to engage in symbolic speech in a public park because of the content of that speech. On April 28, 1983, the Creche Committee commenced a separate action essentially on the same grounds. It was thereafter consolidated with the Citizens Group's action.

SUMMARY OF ARGUMENT

The decision of the Board of Trustees to ban a creche display from Boniface Circle violated the principle of accommodation and content-neutrality required by the First Amendment. The public display of a privately owned creche in a park in the Village of Scarsdale among and along with Village-sanctioned Christmas decorations and festivities is no real threat to the fate of the Establishment Clause. Nothing in this case gives even a remote sign of leading to an established church or religion in the United States or the Village of Scarsdale.

The Free Speech Clause prohibits content-based discrimination against religious speech in a traditional public forum. When government seeks to restrict expression, it bears the burden of justifying its action under appropriate standards

that the Court has articulated. The Board's and the Village's ability to prohibit expressive activity in Boniface Circle is severely limited. In order to justify any content-based exclusion of speech in Boniface Circle, the Board and the Village must demonstrate that the exclusion "is necessary to serve a compelling state interest". *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). The Board's refusal to permit the display of a creche in Boniface Circle constituted a prior restraint on the Citizens Group's right to make their Christmas statement to the community in the most effective and relevant forum in the Village for such purpose. Since there were no pre-existing content-neutral standards to guide the Board, refusal was plainly illegitimate. Despite there being a history of open access to the parks and public properties in the Village, the Board and the Village singled out the Respondents for exclusion. A local government which can arbitrarily grant or deny the right to speak in a traditional public forum in accordance with what it deems to be "socially desirable", or in the "public interest" or "welfare" of the community is indistinguishable in all relevant respects from a censor. If the Board and the Village wish to regulate speech in Boniface Circle then they must show a precise nexus between that speech and some evil which they have a right to prevent.

The display of a creche at Boniface Circle is protected symbolic speech. Both legal principles and factual considerations support the conclusion that the display of a creche in Boniface Circle warrants presumptive First Amendment protection. Under the test formulated by the Court in *Spence v. Washington*, 418 U.S. 405 (1974), the creche is sufficiently expressive for First Amendment purposes. There can hardly be doubt about the communicative status of the creche in context of the Village's celebration of Christmas. Indeed, the Board and the Village admit that it is expressive, that it has a message, for it is because of this message that they banned it from Boniface Circle.

The suppression of the Citizens Group's religious expression is not necessary to further a sufficient government interest.

The Board and the Village have fallen far short of their burden of demonstrating that the Board's decision was essential in order to serve a compelling state interest. Where the forum for expression is a public park the justification offered for exclusion of protected speech must be probed with exacting scrutiny.

Allowing a display of the creche in Boniface Circle for a short time during the Christmas season does not violate the Establishment Clause. Two recent decisions of the Court, *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984), dictate that the Citizens Group's rights of free expression must prevail over the alleged Establishment Clause interest asserted by the Board and the Village. This case involves the display of a privately owned creche in a traditional public forum and thus *a fortiori* satisfies the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) as applied by the Court in both *Widmar* (limited public forum) and *Lynch* (city-owned creche). Since Boniface Circle is a "quintessential" public forum and not a limited public forum as the Court found the University to have created in *Widmar*, access for expression there must be even more strongly protected. The argument that a private symbolic display gives rise to an *appearance* of Village sponsorship is foreclosed by *Lynch* where the city's actual sponsorship was found not to offend the Establishment Clause.

There is no other sufficient government interest at stake to support the exclusion of the Citizens Group's religious expression from Boniface Circle. A neutral policy of accommodation and equal access cannot coerce expression or constitute favoritism. Mere shadows of apprehension and fear cannot animate these concerns. The authorities cited by the Board and the Village reinforce the principle of free speech—they cannot be read to support the principle of "freedom from free speech". The Board's and the Village's objection to viewing a message they do not want to see is not entitled to constitutional solicitude. For the Free Speech Clause to have any meaning, particularly in the area of religious expression, an environment of tolerance, not sensitivity, must prevail. A posture of equal

access to a traditional public forum cannot reasonably be misinterpreted as an appearance of favoritism. The Board's and the Village's attempt to arouse apprehension by presenting an *ad horrendum* argument cannot be allowed to overwhelm the Citizens Group's protected right of religious expression.

ARGUMENT

Introductory Statement

The First Amendment forbids both establishment and hinderance of religion, and requires government to assume a neutral posture towards religion and religious expression. The Citizens Group submits that the kind of government neutrality mandated by the First Amendment is a benevolent neutrality, not a malevolent neutrality. Benevolent neutrality, given effect in an environment of accommodation promotes the fundamental values embodied in the Free Speech Clause and the Religion Clauses. Malevolent neutrality or hostility, even if it could be wielded in an even-handed manner would inevitably undermine these fundamental values. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). There is no constitutional requirement which makes it necessary for government to be hostile to religion. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Accommodation is all that has ever been requested from the Village with respect to a creche display in Boniface Circle during the Christmas season. None of the three main evils against which the Establishment Clause was intended to afford protection, " 'sponsorship, financial support, and active involvement of the sovereign in religious activity' " are present in this case. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (quoting from *Walz v. Tax Commission*, 397 U.S. 664, 668). Jefferson's well known reference to a "wall of separation between church and state" may suggest that governmental accommodations to religion must be condemned. But as Justice Powell noted in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 760 (1973), "this Nation's history has not been one of entirely

sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation". Recent decisions of this Court have confirmed that there was no intention on the part of the Framers to censor or eradicate religion from public life. *See, Marsh v. Chambers*, 463 U.S. 783 (1983); and *Lynch v. Donnelly* 104 S.Ct. 1355 (1984).

The refusal by the Board of Trustees and the Village to permit symbolic religious expression in a traditional public forum is not a realization of Establishment Clause neutrality. To the contrary, after many years of taking a proper neutral stance of accommodation, the refusals by the Board in 1981 and 1982 reflect a conscious institutionalization of hostility against a religious message considered "offensive" or "socially undesirable". This hostility has altered the Board's and the Village's perspective with respect to First Amendment freedoms. Indeed, throughout the Board's and the Village's argument there is a central theme—that there is a First Amendment "right" not to be exposed to the public display of the religious symbols of others—that the right of freedom *of* religious expression is in reality a right of freedom *from* religious expression in the Village square.

The decision of the Board of Trustees violated the principle of accommodation and content-neutrality required by the First Amendment. Ironically, the Board forbade a private display in a traditional public forum of a symbol depicting the historical and religious roots of the Christmas holiday, but permits Scarsdale's official observance of the holiday itself named for and commemorating the birth of Jesus Christ, and Village-sanctioned Christmas displays and activities in that same forum. The only justification which would support the Board's denial of a creche display in Boniface Circle for a short period of time in such context would be a constitutional requirement that passive accommodation by government of religion must be eliminated, at least with respect to Christmas and its identification with the birth of Christ. Simply put, the Board's position is that the people's Christmas displays in Boniface Circle must be "Christ" free.

While selective government advancement of religious activity has never been part of the national tradition and is clearly prohibited by the Establishment Clause, government accommodation of the religious beliefs and customs of the American people and of the religious heritage of our institutions has been part of the fabric of our national life since the adoption of the First Amendment. The Board's decision and argument before this Court runs contrary to this historical and political truth. It is truly an act of censorship against the Christmas holiday itself. The nativity theme is an accepted and traditional part of the American Christmas. To recognize Christmas but prohibit the recognition of one of its components would, as the Court said in another context "give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state." *McGowan v. Maryland*, 366 U.S. 420, 445 (1961).

The public display of a creche in a park in the Village of Scarsdale among and along with Village-sanctioned Christmas decorations and festivities is no real threat to the fate of the Establishment Clause. Neither are the abundant examples throughout the United States for many years of citizens publicly celebrating "Christmas" as an historical and religious event. These practices should be tolerably accommodated since they are the expression of beliefs and cherished traditions of deep moral sentiment widely held by the people of this country, as well as by the people of Scarsdale. Nothing in this case gives even a remote sign of leading to an established church or religion in the United States or the Village of Scarsdale.

For the reasons set forth below, the Citizens Group submits that the Board of Trustees and the Village must permit their temporary display of a creche in Boniface Circle during the Christmas season.

I. THE FREE SPEECH CLAUSE PROHIBITS CONTENT-BASED DISCRIMINATION AGAINST RELIGIOUS SPEECH IN A TRADITIONAL PUBLIC FORUM

At the heart of the free speech guarantee of the First Amendment is the requirement of content-neutrality in terms of government's surveillance. This principle means that when government seeks to restrict expression because of its message or subject matter, government bears the burden of justifying its action under appropriate standards that the Court has articulated. The Board of Trustees and the Village concede that Boniface Circle is a traditional public forum, that the creche display is a form of speech for First Amendment purposes and that the denials were content-based.

A. The Board's and the Village's Ability to Prohibit Expressive Activity in Boniface Circle is Severely Limited

The Court has said that the standards by which content-based restrictions of the right to speak on public property are to be judged depend on the character of the property. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). In *Perry*, the Court stated that forums such as streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," are "quintessential" public forums. In order to justify any content-based exclusion of speech in such a traditional forum, whether of entire subject areas or of particular ideas or viewpoints, government must demonstrate "that its regulation is necessary to serve a compelling state interest" and "is narrowly drawn to achieve that end." *Perry* at 45.

The special status afforded to traditional public forums was reaffirmed in *United States v. Grace*, 461 U.S. 171 (1983). In *Grace*, this Court struck down a statute which prohibited demonstrations on the sidewalks in front of the Supreme Court building, stating " '[P]ublic places' historically associated with

the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more to be 'public forums.' " *Id.* at 177. A government may not impose an absolute ban on expressive conduct in a public forum but may implement only reasonable time, place and manner restrictions. These restrictions in turn must be content-neutral and narrowly drawn to serve a significant government interest. *Id.*

As confirmed by the courts below, Boniface Circle is a "quintessential" public forum where the exercise of First Amendment rights is most important and protected. As such, the Board's and the Village's ability to prohibit expressive activity in Boniface Circle is severely limited. The Board denied the Citizens Group access to Boniface Circle to display a creche for 10 days even though the Village permits the Circle and the surrounding streets to be decorated with Christmas lights and ornaments for over four weeks each year. The Board did so because, according to the then Chairman of the Board's Law Committee, four Trustees found the display to be "socially undesirable". (J.A. 50-53; Stip. Ex. 66, *The Scarsdale Inquirer*, December 16, 1982, p. 1). As admitted by the Board and the Village in their Brief (Pet. Br. 8) the message being conveyed by the display was thought to be offensive or disturbing to some of Scarsdale's residents.[4]

The refusal by the Board to permit the display of a creche during Christmas did not involve an attempted time, place or manner restriction.[5] It constituted a prior restraint on the

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4 Time and time again, on facts not so different from those of this case, the Court has held that public forums are to be made available for religious expression, however unpopular that expression may be. *See Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

5 According to the Village Manager, there has never been any complaint as to the time, place or manner of the annual creche display in Boniface Circle, and the display never created a single traffic or safety problem. In years past, the Creche Committee restored Boniface Circle to its previous condition after each creche display, and no evidence has been produced that the park has ever been damaged in any way by the creche display. (J.A. 303-304; J.A. 36).

Citizens Group's right to make their Christmas statement to the community in the most effective and relevant public forum in the Village for such purpose. Recently, in *Members of the City Council v. Taxpayers for Vincent*, 104 S.Ct. 2118, 2128 (1984), this Court confirmed that there are some interests—such as a desire to suppress support for a minority party or an unpopular cause—that are plainly illegitimate. In *Vincent*, this Court went on to say that the general rule forbidding government regulation of speech in ways that favor some viewpoints or ideas at the expense of others did not apply, since unlike in this case, there was not even a "hint of bias or censorship" in the municipality's enactment or enforcement of an ordinance restraining First Amendment activities. There also was no claim in *Vincent* that the ordinance was designed to suppress certain ideas that the municipality found distasteful or that it had been applied to the speakers because of the views that they expressed. *Id.* at 2128.

The refusal by the Board without being guided by pre-existing content-neutral standards is plainly illegitimate. The Board cannot sit to decide what can or cannot be said in Scarsdale's streets and parks. Boniface Circle is a public park, supported and maintained by all of the Village's residents. As such, it is a public forum, open to all types of expression, including the religious expression of the Citizens Group. Above all else, the First Amendment means that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content". *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone". *Id.* at 96.

The Court of Appeals found that "[i]t is undisputed that throughout the years covered by this litigation, Scarsdale, acting through its Board, usually granted requests for access to and use of its parks and public properties. Rather than issue a complete denial, on each occasion that it did not grant a specific request, the Board usually chose to approve access to the use of alternative public property." (Pet. App. 4a). None-

theless the Board and the Village continue to argue that they have the right to single out the Respondents and deny them access to make their statement in Boniface Circle or in alternative public forums in the Village. At the same time, the Village has regularly permitted symbolic displays in and uses of its public facilities by many groups including religious groups, presumably because no one in the Village has objected to this accommodation or the Board does not find them "offensive" or "socially undesirable". (Pet. App. 4a-5a, 46a; Pet.Br. 3).

Citizens have an absolute right to speak in public forums provided their mode of communication does not interfere with the rights of others and is not basically incompatible with the normal activity of a particular place at a particular time. *See, e.g., Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969); and *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).[6] If this right, as the Board and the Village argue, is only exercisable if they consent to the speaker, the Free Speech Clause has no meaning. A local government which can arbitrarily grant or deny the right to speak in a traditional public forum according to what it deems to be "socially desirable", or in the "public interest" or "welfare" of the community is indistinguishable in all relevant respects from a censor.[7] The Court has consistently held that such prior restraint without adequate standards is precisely the sort of abuse against which the First Amendment was primarily directed. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1974); *Shuttlesworth v. Birmingham*,

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6 The record in this case discloses no evidence that the annual creche display interfered with the rights of others to use Boniface Circle.

7 The Citizens Group's right to display their creche in Boniface Circle is in no way affected by the availability of private sites, presumably their homes. "Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place' ". *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1974) (quoting from *Schneider v. State*, 308 U.S. 147, 163 (1939)).

394 U.S. 147, 153 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); and *Saia v. New York*, 334 U.S. 558, 559 (1948).

If the Board of Trustees and the Village wish to regulate speech in Boniface Circle then they must show a precise nexus between that speech and some significant evil which they have a right to prevent.

B. The Display of a Creche at Christmas in Boniface Circle is Protected Symbolic Speech

Both legal principles and factual considerations support the conclusion that the display of a creche in Boniface Circle is sufficiently expressive to warrant presumptive First Amendment protection.

The creche display is similar to the red flag in *Stromberg v. California*, 283 U.S. 359 (1931), the black arm band in *Tinker v. Des Moines Independent Community School District* 393 U.S. 503 (1969) and the peace symbol on the flag in *Spence v. Washington*, 418 U.S. 405 (1974) in that it is a device designed to communicate views on matters of public importance.

In holding that the symbolic expression was protected speech in *Stromberg*, *Tinker* and *Spence*, the Court applied a two-part analysis. First, the Court determined that the use of the symbol—the red flag, the black arm band and the altered American flag—was a form of expression; or in the words of the *Tinker* Court, "closely akin to 'pure speech'." 393 U.S. at 505. Once the Court had made this determination, the symbolic expression was presumed to be protected speech. It then became the task of the government to offer a compelling justification for the attempted suppression. In each of these cases, the government was unable to overcome this presumption.

In those instances when the Court has upheld bans on expressive activity, it has utilized the same two-part analysis referred to in *Stromberg*, *Tinker* and *Spence*. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court found that the

government's interest in maintaining an efficient Selective Service registration system justified a prohibition on draft card burning, despite the obvious communicative nature of the act. The government's need for a ban on the destruction or mutilation of a draft card provided precisely the fact-based justification which was lacking in *Stromberg*, *Tinker* and *Spence*. And in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the government's demonstrated need to regulate traffic flow on a crowded fairground justified its limitation on peripatetic solicitation.

The teaching of these cases is clear. Once non-verbal activity is deemed to play a significant role in the communication of ideas, it qualifies for presumptive First Amendment protection, which can only be rebutted by a showing that suppression is the only way to achieve a significant and legitimate social goal. If the government fails to make such a showing, it must accommodate and tolerate the non-verbal activity.

Is the creche display sufficiently expressive speech for First Amendment purposes? A test used by the Court to determine whether non-verbal activity is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[ ]," is set forth in *Spence v. Washington*, 418 U.S. 405, 409 (1974). The *Spence* test requires examination of the intent of the would-be communicator and the context in which the non-verbal activity takes place. In *Spence*, the Court held that displaying the American flag with an attached peace symbol in the context of demonstrations against the bombings of Cambodia and the Kent State killings:

> was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

Id. at 410.

The courts below both found that a symbol for First Amendment purposes may be a form of speech (Pet. App. 12a, 40a n.5—noting that the Village conceded this point). In the words of the District Court—"Thus, there is no dispute here that an application to 'speak' from public property was denied". (Pet. App. 40a n.5). The creche is more expressive than most symbols since a religious symbol is as content laden as any religious act. Religion relies on symbols for expression and public manifestation is an inextricable part of religion. There can hardly be doubt about the communicative status of the creche and the message it manifests.

The Citizens Group proposed to place a temporary creche in Boniface Circle to celebrate an historical event, express their religious beliefs, and convey a Christmas message of peace and goodwill. (J.A. 172-173). Its intent was communicative in context of the Village's own celebration of Christmas and the surrounding permitted displays of Christmas symbols and Christmas festivities. The creche itself tells the story of the Nativity as recorded in the New Testament of the Bible. Indeed, the Board and the Village admit that it is expressive, that it has a message, for it is because of this message that they banned it from Boniface Circle.

The only remaining issue is whether the Board and the Village have come forth with a sufficiently compelling justification for suppressing the message of the creche. Starting with the initial defense that Boniface Circle, despite having been deeded to the Village "for Park Purposes Only" (Pet. App. 42a) was not a park, almost two years of litigation have produced a plethora of baffling authorities and considerations allegedly supporting the Board's denials. The latest is a parade of horribles which the Board and the Village say will fall upon communities if creches are allowed to appear at Christmastime. Not even the sum of these purported justifications can veil the stark truth that no sufficiently compelling justification exists for suppressing the display of a creche in Boniface Circle.

II. THE SUPPRESSION OF THE CITIZENS GROUP'S RELIGIOUS EXPRESSION IS NOT NECESSARY TO FURTHER A SUFFICIENT GOVERNMENT INTEREST

The Board and the Village assert that the following concerns animated those who voted against allowing the creche in Boniface Circle: (1) the creche, since a religious symbol, should not be on Village property, particularly when it might give offense to a substantial number of Scarsdale residents; and (2) the Establishment Clause might be violated by allowing the display on Village land due to the inherent religiosity of the creche's message. (Pet. Br. 8). The Court has instructed time and time again, that such a content-based exclusion will only be tolerated if the government can demonstrate that its action was "necessary to serve a compelling state interest" and that it was narrowly tailored to achieve that end.[8] *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 270 (1981); and *Perry Educ. Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 45 (1983). Under this standard, the Board and the Village have fallen far short of their burden of demonstrating that the Board's decision was essential to further a sufficient government interest.

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8 Of course, the Board and the Village could also enforce "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). However, the Board's action is not a time, place or manner restriction. It is a blanket prohibition against display of the creche in Boniface Circle without the benefit of any regulations or discernable standards. Moreover, the Board's decision was not content-neutral. In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court not only stated that content-neutrality was a major criterion for a valid time, place and manner restriction, *Id.* at 648, but expressly warned against the more covert forms of discrimination that may result when arbitrary discretion is vested in public officials. *Id.* at 649. Clearly, the Board's unfettered discretion in denying access to Boniface Circle presents a very real threat to expression protected by the First Amendment.

In defense of their exclusion of the Citizens Group's creche display, the Board and the Village have proffered the following governmental interests: (i) avoiding a violation of the letter or spirit of the Establishment Clause; (ii) avoiding compelled support by the citizens of Scarsdale of religious ideas which the citizens oppose; and (iii) avoiding favoritism among sectarian interests. (Pet. Br. 32). A reasoned inquiry into the facts of this case, however, illuminates a different reality—that none of these interests are here at risk in any significant respect.

In appropriate circumstances rights of free expression must give way to sufficiently important government interests where such interests are genuinely at stake and where no less intrusive measure will protect such interests. *See, e.g., Members of the City Council v. Taxpayers for Vincent*, 104 S.Ct. 2118 (1984) (where political signs were prohibited from utility poles). Indeed, a contrary result would inevitably derail the social engine. Yet, where the forum for the expression is a street, a sidewalk or a public park, the justifications offered for exclusion of protected expression must be probed with exacting scrutiny. This is true not only because such places are our traditional forums for social debate, but because governmental interests are typically less imperative in these forums. *See, e.g., United States v. Grace*, 461 U.S. 171 (1983). Under appropriate scrutiny, the Village's alleged interests do not warrant intrusion on the Citizens Group's First Amendment rights of free speech.

A. Allowing Display of the Creche in Boniface Circle for a Short Time During the Christmas Season Does Not Violate the Establishment Clause.

Two recent decisions of this Court, *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984) impact forcefully on the Establishment Clause defense advanced by the Board and the Village. A meaningful reading of these cases requires the Citizens Group's rights of free expression to prevail over the alleged Establishment Clause violation.

In *Widmar*, the Court had to resolve a tension between the Free Speech Clause and the Establishment Clause. As in this case, religious speech and rights of association protected by the First Amendment were excluded from the forum. 454 U.S. at 269. However, unlike in this case, the University's decision to exclude the student group was guided by a pre-existing University regulation.[9] In addition, the Court expressly recognized that a "university differs in significant respects from public forums such as streets or parks or even municipal theaters." *Id.* at 268 n.5. Nevertheless, the Court instructed that the University had to show that its prohibition of expression was necessary to serve a compelling state interest and that it was narrowly tailored to achieve that end. *Id.* at 270. The University based its denial on the Establishment Clause. The Court determined that although complying with the Establishment Clause may be characterized as a compelling interest, such defense must be scrutinized under the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). *Widmar*, 454 U.S. at 271. The Court held that a policy of equal access would not offend the Establishment Clause. Consequently, the exclusion was determined a violation of First Amendment rights of free speech. *Id.* at 277.

In this case, where the forum is a park and not a limited forum as the Court found the University to have created in

9 Without articulable standards to guide regulation of protected expression, the protections embodied in the Free Speech Clause are particularly vulnerable to encroachment. *Cf. Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). Moreover, the University in *Widmar* sought only to prevent a student group from using its property; it did not seek to completely exclude the group from an important University event. In the present case however, the Board has banned the Respondents from participating in the Village's Christmas celebration. The Village, unlike the University, is actively involved in this celebration, permitting and endorsing symbols and other conduct concerning the Christmas holidays to be displayed and carried on in Boniface Circle and its immediate environs.

Widmar,[10] access for expression must be even more strongly protected. The Board and the Village contend, however, that allowing a private display of a creche, since it is a symbol, poses a different Establishment Clause question than allowing religious expression and worship in classrooms. Specifically, the Board and the Village allege that the private display of a creche gives rise to an *appearance* of Village sponsorship which violates the Establishment Clause. (Pet. Br. 36, 37). However, this argument was foreclosed by this Court's recent decision in *Lynch v. Donnelly* in which Pawtucket's *actual* sponsorship of a creche was found not to offend the Establishment Clause.

In *Lynch*, this Court was faced with a more serious Establishment Clause threat than is here alleged—Pawtucket actually owned and sponsored the creche display. 104 U.S. at 1358. In addition, no counterbalancing free speech right was there at risk. Nevertheless, Pawtucket's display was upheld by this Court.[11]

In its Establishment Clause analysis in *Lynch*, as in *Widmar*, this Court applied the *Lemon* test. The plurality found that Pawtucket's desire "to celebrate the Holiday and to depict the origins of the Holiday" were legitimate secular purposes. *Lynch*, 104 S.Ct. at 1363. Addressing the primary effect of the creche, the plurality observed that Pawtucket's display conferred less of a benefit to religion than numerous other governmental activities which this Court had upheld. *Id.* at 1363. It found that even if display of the creche advanced religion, this was an indirect, remote or incidental benefit to religion, not constitutionally infirm. *Id.* at 1364. Lastly, administrative en-

10 Since Boniface Circle is a public park, the Citizens Group need not even allege a denial of "equal-access". Unlike University classrooms, parks are open to all for protected expression except as such may be regulated to further sufficient government interests.

11 It is difficult to understand how the inevitable and trivial factual differences between the display in Pawtucket and the display in Scarsdale could so transmute the Establishment Clause interests at risk as to overwhelm free speech rights.

tanglement was found lacking since there was "no evidence of contact [between government and] church authorities concerning the content or design of the creche." *Id.* Moreover, because *Lynch* did "not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, . . . no inquiry into potential divisiveness [was] even called for." *Id.* at 1364.

The dissenting Justices in *Lynch* confirmed that the *Lemon* test was the appropriate yardstick to measure government action against the principles of the Establishment Clause. However, in their view the *Lemon* test analysis led to a different result.

The dissent determined that the "City's inclusion of the creche in its Christmas display simply does not reflect a 'clearly secular purpose'." *Id.* at 1372. Rather, a sectarian purpose could be inferred since the alleged secular objectives could have been readily accomplished by other means and since the religiosity of the creche reflected a "sectarian exclusivity" inconsistent with merely celebrating the holiday season and promoting retail commerce. *Id.* Next, the dissent concluded that unlike the University policy of equal access in *Widmar*, Pawtucket by owning and displaying the creche and no other religious symbol, singled out Christianity for special treatment. This resulted in an impermissible primary effect. *Id.* at 1374. Finally, the dissent felt that the "powerful emotional reactions which divided the City along religious lines" represented a warning that the values embodied in the Establishment Clause were at risk. *Id.*

As applied to this case, the *Lemon* test would assuage the concerns expressed by both the majority and the dissent in *Lynch*. Clearly, there is no impermissible sectarian government purpose—permitting the private display would merely be accommodating protected rights of free expression in a traditional public forum. As to effect, allowing the display would no doubt advance religion in a sense. Yet, the effect on religion would be no more than that which accompanies any religious expression in a public forum. This is an incidental benefit to

religion necessary to preserve and promote exercise of the rights protected by the Free Speech Clause—free expression. Clearly, this is not a case where "the power, prestige and financial support of the government is placed behind a particular religious belief." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Finally, with regard to political divisiveness, the Citizens Group notes that the traditional right of equal access to Boniface Circle, a park, should not give rise to divisiveness of a magnitude sufficient to compel intrusion upon First Amendment rights. The "festering" which concerned the dissent in *Lynch* over whether local governments may adopt religious symbols is not here at issue.

Faced with the holding in *Lynch* that government display of a creche during the Christmas season does not violate the Establishment Clause, and faced with the expressed concerns of the dissenting justices in *Lynch*, none of which are significantly at risk in this case, the Board and the Village are forced to argue that *Lynch* is distinguishable and hence, inapplicable. It is respectfully submitted, however, that *Lynch* cannot be distinguished on any legally significant ground.

The Board and the Village argue that *Lynch* is not controlling since Pawtucket's display was on private property while the Village's display was on public property. (Pet. Br. 41). This factual distinction is without significance. This Court in *Lynch* expressly analogized Pawtucket's display to "those to be found in hundreds of towns or cities across the Nation—*often on public grounds*—during the Christmas season." 104 S.Ct. at 1358 (emphasis supplied). Moreover, where public sponsorship and support are direct, as in *Lynch*, such need not be inferred indirectly through the fiction that the "land is the message bearer".[12]

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12 The concept articulated by the District Court, and seized upon by the Petitioners, that the "land becomes the message bearer" of symbolic speech is, to the Citizens Group's knowledge, new to First Amendment jurisprudence.

Contrary to the Board's and the Village's contention (Pet. Br. 42), the context of Pawtucket's display and the display in Boniface Circle are strikingly similar. Both displays are erected only for a short time during the Christmas season. In *Lynch*, the display was located "in a park owned by a nonprofit organization and located in the heart of the shopping district." *Id.* at 1358. In this case, the display was located in Boniface Circle, a small public park in the central business district of the Village. (J.A. 28a). Moreover, both in Pawtucket and in the Village the creche was in the context of a larger holiday display and celebration. In Pawtucket, the park was decorated with "many of the figures and decorations traditionally associated with Christmas. . . " *Id.* at 1358. In Scarsdale, lamp posts in and around the park, and a large evergreen tree in the park are decorated with Christmas lights and ornaments of various kinds and the park is the site of "Christmas Carol Sings" and visits by Santa Claus. In fact, Boniface Circle is the principal locus of the Village's Christmas celebration. (Pet. App. 29a). In short, the displays are substantially similar. To paraphrase the observation of this Court in *Lynch*, "[Scarsdale's] display is essentially like those to be found in hundreds of towns and cities across the Nation—often on public grounds—during the Christmas season." *Id.* at 1358.

In light of these facts, the assertions of the Board and the Village and their *amici* that the creche in Boniface Circle was displayed starkly alone and not within an overall holiday setting is inaccurate and misplaced. (Pet. Br. 42). The distinction advanced here is premised on a myopic view of the proper context—that because no reindeer, Santa Claus house, clown, elephant or teddy bear have been displayed in Boniface Circle, the Boniface Circle display is constitutionally infirm. Clearly, this Court did not intend *Lynch* to be read so narrowly. Such a reading would have absurd consequences. Are the number of lights and ornaments on the evergreen tree and the lamp posts in Boniface Circle to be counted and compared with the number of lights and ornaments in Pawtucket's park? How many reindeer would it take to make display of a creche

constitutionally permissible? Moreover, if the immediate physical context were controlling, local governments could erect creches year round provided they were accompanied by sufficient numbers of secular symbols.

The assertions of the Board and the Village and their *amici* as to context miss the mark. In *Lynch*, this Court acknowledged that the context into which the religious activity is integrated may dilute its otherwise typically singular effect. Yet, this Court was careful to point out that the relevant context was the holiday season: "[the creche must be] viewed in the proper context of the Christmas Holiday season". *Id.* at 1362.

The Board's and the Village's distinction, based on political divisiveness[13] (Pet. Br. 44), merits little discussion. In the words of this Court, "[t]his case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for . . . " *Lynch*, at 1364. In any event, the District Court below concluded:

> The record does indicate the existence of a "divisive political potential" . . . However, a result in the lawsuit, one way or the other, would seemingly leave little to further political debate, and accordingly we do not see the divisiveness element as contributing much to entanglement.

The administrative entanglement argument is equally unpersuasive—and the District Court so found. (Pet. App. 52a-53a). In this case as in *Lynch*:

> There is no evidence of contact with church authorities concerning the content or design of the exhibit . . . No expenditures for maintenance of the creche have been

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13 In light of the peaceful history of the creche display in Scarsdale, the Citizens Group finds it incredible that the Board and the Village analogize the purported "divisiveness" in the Village to the "fear that neighbors would be pitted against each other by jockeying for religious leverage in government just as bloody wars had been fought so often over religion." (Pet. Br. 44–45).

> necessary . . . In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries.

Lynch, at 1364. Because in this case the Citizens Group's creche is privately owned and because the Citizens Group is not affiliated with any church there is no interaction at all between church and state concerning the creche.

Apart from attempting to distinguish *Lynch*, the Board and the Village devote much of their argument to predicting the perceived effect of the creche display in Boniface Circle. (Pet. Br. 17-19). In attempting to fortify their contention that the creche will be mistakenly perceived as Village-sponsored, the Board and the Village claim that the Citizens Group's intent was to co-opt the Village as co-sponsor of their speech—to seek the aura of Village approval—and to seek an imprimatur of the Village. This claim is unsound. First, as a matter of law, the intent or purpose of the Citizens Group is irrelevant—the *Lemon* test dictates that it is government's purpose which is relevant to an Establishment Clause analysis. Second, as a factual matter, such claim is baseless. There is nothing in the record to support such a claim. In no place in the two applications made to the Board by the Citizens Group (J.A. 171-173), the oral statement made to the Board by Respondent McCreary on December 14, 1982 (J.A. 160-168), the Citizens Group Complaint (J.A. 3-10), or the depositions of Respondents McCreary and Butler, which are part of the trial record on appeal, is such an intention stated.[14]

Furthermore, to dispel any misperception of Village sponsorship, an explanatory plaque was placed next to the creche by the Creche Committee and the Citizens Group proposed to do the same. The dissenting justices in *Lynch* expressly acknowledged the effectiveness of such disclaimers—even in the

14 In addition to the statements in their 1982 and 1983 applications, the McCreary deposition testimony clearly contradicts these allegations. (See J.A. 250-251; 252-255; 257-259).

context of direct government sponsorship of the display.[15] In any event, assuming *arguendo* that display of the creche in Boniface Circle would have a perceived effect of the Village supporting religion, in light of *Lynch* this argument cannot prevail in the context of a creche display during the Christmas season. In *Lynch*, where government support was actual—not merely perceived—the effect of such support was characterized as an "indirect, remote or incidental benefit" not constitutionally infirm. *Id.* at 1364.

The most telling distinction between *Lynch* and this case provides additional support for the constitutionality of the creche display in Boniface Circle. In this case, but not in *Lynch*, First Amendment rights of free speech are involved. In the context of private citizens exercising First Amendment rights of free speech, the constitutional balance is tipped. Government conduct which, in the abstract, may tread close to Establishment Clause proscriptions, may be nothing more than constitutionally-mandated accommodation of the exercise of protected rights. The dissent in *Lynch* recognized this. Referring to this very case and distinguishing Pawtucket's creche the dissent stated:

> Inclusion of the creche is not necessary to accommodate individual religious expression. *This is plainly not a case in which individual residents of Pawtucket have claimed the right to place a creche as part of a wholly private display on public land.* Cf. . . . *McCreary v. Stone*, *Lynch*, *supra* at 1382. ____F.Supp.____ (1983) (emphasis supplied).

15 The dissent stated:

> Moreover, the City has done nothing to disclaim governmental approval of the religious significance of the creche . . . when the Court of Appeals for the District of Columbia approved the inclusion of a creche as a part of a national "Pageant of Peace" on federal parkland adjacent to the White House, it did so on the express condition that the government would erect "explanatory plaques" disclaiming any sponsorship of religious beliefs associated with the creche. . . . In this case, by contrast, Pawtucket has made no effort whatsoever to provide a similar cautionary message.
> *Lynch*, 104 S.Ct. at 1376.

In sum, the plurality of this Court concluded in *Lynch* that any notion that Christmas symbols such as the creche "pose a real danger of establishment of a state church is far-fetched indeed". *Id.* at 1366. Moreover, the expressed concerns of the the four dissenting Justices in *Lynch* are not jeopardized by policies of equal access and accommodation in public forums. The "precious religious diversity" of our nation is not here threatened by government's adoption of a religious symbol—rather, it is threatened by the Board's denial of a request for equal access to a traditional public forum.

B. There is No Other Sufficient Government Interest at Stake to Support the Exclusion of the Citizens Group's Religious Expression From Boniface Circle

The Board and the Village allege that avoiding coerced expression of the citizens of Scarsdale and avoiding favoritism also support the Board's denial of a creche display in Boniface Circle. Yet, a neutral policy of accommodation and equal access cannot coerce expression or constitute favoritism. Mere shadows of apprehension and fear cannot animate these concerns.

The Board and the Village reason that the creche is opposed by some Villagers and hence, "[i]f a court or other public official overrides these and allied objections, compelling placement of the creche in the park, these opponents are dragooned into supporting the symbol and its public statement." (Pet. Br. 32). To support their argument, the Board and the Village rely on *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Barnette*, the Court acknowledged that a compulsory flag salute, which would subject any non-participating child to serious sanctions, violated an individual's right to speak his own mind. 319 U.S. at 634. The Court affirmed the lower court's ruling enjoining enforcement of the regulation requiring the flag statute against Jehovah's Witness-appellees. *Id.* at 642. Similarly, in *Wooley*, the Court determined that New Hampshire's statute which required display of state license

plates bearing the motto "Live Free or Die", violated appellees' rights to refrain from speaking. 430 U.S. at 717. The Court upheld the lower court's decision which enjoined the state from arresting and prosecuting the appellees for covering the portion of their license plates which contained the motto. *Id.*

In each of *Barnette* and *Wooley*, persons were compelled by force of law to dictated expression. In both cases, the Court determined that the individual's right of free speech, including the right to refuse to speak the thoughts dictated by others, outweighed the alleged government interests in compelling the expression. Moreover, in *Barnette* the Court noted that the appellee's non-compliance with the compelled expression would not interfere with the free speech rights of others. 319 U.S. at 630. Finally, in both *Barnette* and *Wooley*, the remedy was to enjoin enforcement of the law against the appellees—not to prohibit others from participating in such expression.

The Board and the Village attempt to transmute *Barnette* and *Wooley* from a shield protecting free speech, by preventing governmental compulsion of dictated expression, to a sword to be used against free speech, by prohibiting protected expression with which the viewer may not agree. *Barnette* and *Wooley* reinforce the principle of free speech—they cannot be read to support the Board's and the Village's principle of "freedom from free speech".

Since Boniface Circle is held in trust by the Village for the people, the Board and the Village argue that by allowing the display of the creche, Villagers would be compelled to bear a message with which they do not agree. (Pet. Br. 32-35). However, it is curious logic indeed which imputes to the listener or the viewer the message of the speaker. This would necessarily result in a prohibition of all expression in public parks with which any listener or viewer did not agree. In essence, the Board's and the Village's objection is to a message that they do not want or want others to see.

This interest is not entitled to constitutional solicitude. With the benefits of free speech come the burdens of hearing or viewing differing messages. For the Free Speech Clause to have meaning, particularly in the area of religious expression, an environment of tolerance, not sensitivity, must prevail. The Board and the Village and all others are and must remain free to voice their countering or confirming views—they cannot, however, be given veto power over the religious messages of others. The Court summarized this principle in *Tinker v. Des Moines School District*, 393 U.S. 503, 508 (1968):

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Clearly, the Court's admonition applies *a fortiori* to public parks. *See also*, *Spence v. Washington*, 418 U.S. 405, 412 (1973)—"It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

As a final justification for excluding a creche display from Boniface Circle, the Board and the Village assert that the Trustee's action was "sound fulfillment of their duty not to play favorites." (Pet. Br. 35). Inasmuch as complying with its duty of holding open the doors of a public park to protected

expression could not sensibly be determined to be playing favorites, the Board and the Village once again resort to the "appearance" argument—the Village must avoid even the appearance of playing favorites. However, in a public park, unlike might be the case in city buses (*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)), or utility poles (*Vincent, supra*), or on the side of a mountain in a state forest (*ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983)) the appearance of playing favorites alone is not sufficient. Moreover, due to the characteristically "public" nature of the Village square, the nexus between government and the expressed message is particularly tenuous. As a result, the apprehension of appearance of selective government endorsement in a "quintessential" public forum as opposed to other public property, such as the side of a mountain, is diluted. A posture of equal access to a traditional public forum cannot reasonably be misinterpreted as appearance of favoritism—the Village would be favoring none but merely accommodating all.

Although not expressly asserted as a counterbalancing interest, the Board and the Village present an *ad horrendum* argument that American flags bearing swastikas and hammers and sickles (Pet. Br. 24), vulgar signs (Pet. Br. 30), burning Klan crosses (Pet. Br. 31), and signs saying "God does not hear the prayers of Jews" (Pet. Br. 34) would inevitably result from allowing a creche display at Boniface Circle. This conclusion is unsound both as a matter of fact and law.

First, as a factual matter it must be noted that creche displays on public property at Christmas have pervaded this country in cities and towns, such as Scarsdale, over the years. Nevertheless, displays of burning Klan crosses and swastikas on public property are rare indeed, and have never occurred in Scarsdale. Furthermore, no nexus between the creche displays and those of burning crosses and swastikas has thus far been suggested. It belies common sense to suggest that a decision of this Court allowing a private creche display in Boniface Circle would encourage public displays of burning Klan crosses and swastikas.

Second, as a matter of law, rights of expression may be regulated to further sufficient government interests both in the form of reasonable time, place and manner restrictions, *Cox v. Louisiana*, 379 U.S. 559 (1965), and in compelling circumstances of clear and present danger or "fighting words", as an outright prohibition. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Certainly, burning Klan crosses and other symbolic speech attacking or villifying a creed or race, if protected speech at all, gives rise to counterveiling government interests of a magnitude sufficient to warrant regulation—celebratory displays typically would not.

In any event, burning crosses and swastikas are not at issue in the case before this Court. Unlike the Board and the Village, the Citizens Group is not asking this Court to rule on those issues. The Board's and Village's attempt to arouse apprehension cannot be permitted to overwhelm the Citizens Group's protected right of religious expression. The naked assertion of undifferentiated fear cannot justify suppression. *Tinker*, 393 U.S. at 508.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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